Office - Supreme Court, U. S.
FILED
AUG 16 1944
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1944.

No. 349

SPRINGFIELD SAND & TILE CO., *et al.*,
Defendants-Appellants,
Plaintiffs-Appellants,

v.

JAMES BAGNEL,
Plaintiff-Appellee,
Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS H. MAHONY,
Attorney for Petitioners.

Of Counsel:
JOHN I. ROBINSON,
JOSEPH J. LEONARD.

LAWYERS' BRIEF & PUBLISHING CO.
BOSTON, MASS.

SUBJECT INDEX.

	PAGES
PETITION	1
Statement	2
Statute under consideration	3
Jurisdiction	3
Questions presented for consideration	4
Reasons relied upon for the allowance of the writ	5
Prayer for writ	5
BRIEF	6
Opinion of the Circuit Court of Appeals	6
Jurisdiction	6
Statement of the case	6
Specification of errors	6
Points to be discussed	6
Argument	7
I: Section 15 of the Mass. Workmen's Comp. Act, and effect	7
A. Laws of situs	7
B. Effect of Section 15	8
II: Section 18 of the Mass. Workmen's Comp. Act, and effect	9
III: Section 24 of the Mass. Workmen's Comp. Act, and lack of effect	13
IV: Conflict of Laws and Due Faith and Credit to requirement	14
V: Conclusion	15
APPENDIX	16

TABLE OF AUTHORITIES.

Statutes Involved.

Page

Mass. Gen. Laws, Ch. 152, Sects. 1, 4, 6, 7, 15, 18, 21, 22, 24, 26, 46 16
Consolidated Laws of N. Y. Ch. 167, Sect. 29..... 19
U. S. Constitution, Art. IV, Sect. 1..... 21

Cases Cited.

Bindbeotel vs. L. D. Wilcutt & Sons Co., 244 Mass. 195.. 11
Carlson vs. Dowgielewicz, 304 Mass. 560.....10, 11, 12, 15
Clark vs. M. W. Leahy Co. Inc., 300 Mass. 565....10, 12, 15
Cozzo v. Atlantic Refining Co., 299 Mass. 260..... 11
Dennick vs. Central RR., 103 U. S. 11..... 8
Dresser v. N. H. Structural Steel Co., 296 Mass. 97..... 11
Furlong vs. Cronan, 305 Mass. 464..... 9
Herman vs. Sladowsky, 301 Mass. 534.....8, 15
Jackson vs. Anthony, 282 Mass. 540.....8, 15
Jordan vs. Orcutt, 279 Mass. 413..... 9
Magnolia Petroleum Co. vs. Hunt, 64 U. S. S. C. Rep. 208 .....5, 7, 15
Miller vs. Richards, 305 Mass. 424..... 9
Pacific Employers' Ins. vs. Industrial Accident Com., 306 U. S. 493 .....5, 8, 15
Peterson vs. Boston & Maine RR., 310 Mass. 45.....8, 15
Tocci's Case, 269 Mass. 221 9
Young vs. Masci, 289 U. S. 253..... 8

Supreme Court of the United States

October Term, 1944.

No. .....

SPRINGFIELD SAND & TILE CO., *et al.*,
Defendants-Appellants,
Plaintiffs-Appellants,

v.

JAMES BAGNEL,
Plaintiff-Appellee,
Defendant-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Your petitioners, Springfield Sand & Tile Company and Construction Service Corporation, respectfully submit the following petition for a writ of certiorari and pray that the same may issue to review the judgment of the United States Circuit Court of Appeals for the First District which was entered July 6, 1944, vacating two judgments and two de-

crees of the District Court of the United States for the District of Massachusetts.

Statement.

The two original law actions for personal injury based on negligence were brought by the plaintiff-appellee, James Bagnel, and the two resultant cross petitions for declaratory judgments were brought by the plaintiffs-appellants in the District Court of the United States for the District of Massachusetts. A specially pleaded defense, in the nature of a plea in bar—that the Workmen's Compensation Act of Massachusetts precluded recovery at law by the plaintiff—filed in each law action was severed and tried before Wyzanski, J., of the District Court with the petitions for declaratory judgments based upon the same propositions of law, and judgment was entered for the defendants-appellees in the law actions and final decrees were entered for the same parties as plaintiffs-appellants on the petitions for declaratory judgments (Record, pp. 7, 9).

The appellee, Bagnel, appealed to the United States Circuit Court of Appeals for the First Circuit, in a consolidated appeal which included the four cases and the Circuit Court of Appeals which (Record, pp. 7-11) on July 6, 1944, vacated said judgments and final decrees (Record, p. 21).

The original law actions, brought by Bagnel, are common law actions for personal injury, received while temporarily working in Massachusetts, and allegedly due to the negligence of an employee of a subcontractor of Bagnel's New York employer and were begun after acceptance by Bagnel of compensation under the Workmen's Compensation Act of New York, from the insurer of his employer, the general or

superior contractor, the insurer covering the said employer under the Workmen's Compensation Act of Massachusetts also. The severed special defense in each of said law actions and the petitions for declaratory judgments, asserting the non-existence of any such right of action at common law, under such circumstances are founded upon the Workmen's Compensation Act of Massachusetts—General Laws, Chapter 152, Sections 15 and 18, hereinafter referred to as "the Act."

The facts of the case, so far as they are applicable to the present petition, are set forth adequately in the opinion of the Circuit Court of Appeals, which opinion is printed in the record at pp. 25-45, and which is incorporated herein by reference.

Statute Under Consideration.

The statute upon which the special, severed defences in the law actions and the petitions for declaratory judgment are based is the Workmen's Compensation Act of Massachusetts, Chapter 152, Sections 15 and 18. These sections and other pertinent provisions of the Act will be found in the appendix on pages 16-21 and are incorporated herein by reference.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, Sec. 1; 43 Stat. 938; 28 U. S. C., sec. 347 (a). Judgments and final decrees were entered by the Circuit Court of Appeals for the First Circuit on July 6, 1944.

Questions Presented for Consideration.

The questions presented for the consideration of this Court are:

Was the Circuit Court of Appeals in error—

1. In holding that the Springfield Sand and Tile Company and the Construction Service Corporation had not established their special defenses—that the Workmen's Compensation Act of Massachusetts (Sects. 15, 18), precluded maintenance of Bagnel's common law action.
2. In holding that the Springfield Sand and Tile Company and the Construction Service Corporation had failed to sustain the burden of proving their right to relief by way of declaratory judgment based upon the same facts and propositions of law.
3. In holding that Bagnel was not disabled from maintaining his common law actions under the laws of New York against the Springfield Sand and Tile Company and the Construction Service Corporation by reason of the provisions of the Massachusetts Workmen's Compensation Act (Sects. 15, 18).
4. In holding that until and unless Bagnel's employer gave notice of insuring under the Massachusetts Workmen's Compensation Act (Sect. 24), Bagnel was not obliged to reserve his common right in writing and was not shown to have waived any such common law right.
5. In holding that until and unless a period of thirty days expired after Bagnel's employer had insured under the Massachusetts Workmen's Compensation Act and given notice thereof, Bagnel was not obliged to give his employer any written notice of his reservation of

his common law right and/or was not shown to have waived such right.

6. In ruling that said Section 24 was applicable to and decisive of the issues raised by the pleadings referred to.
7. In vacating the judgments and final decrees of the District Court for the District of Massachusetts.

Reasons Relied Upon for Allowance of Petition and Issuance of Writ of Certiorari.

1. The problems inherent in this case involve an important question of Conflict of Laws;
2. The judgment of the Circuit Court of Appeals is revolutionary in character in that the Circuit Court of Appeals has decided a question of Conflict of Laws contrary to the decisions of this Court as set forth in the recent cases of *Pacific Employers Insurance Co. vs. Industrial Accident Commission*, 306 U. S. 493, 502 and *Magnolia Petroleum Co. v. Hunt*, 64 U. S. S. C. Rept. 208, and contrary to the provisions of Article 4, section 1 of the Constitution of the United States and contrary to the adjudicated cases of the Supreme Judicial Court of Massachusetts, admittedly without any authority in either jurisdiction to warrant or support such judgment (Record, pp. 15-16).

Prayer for Writ.

It is therefore respectfully requested that this petition be granted and that a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit issue.

Respectfully submitted by

THOMAS H. MAHONY,
Attorney for the Petitioners.

Of Counsel:
JOHN I. ROBINSON,
JOSEPH J. LEONARD.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Circuit Court of Appeals for the First Circuit.

The opinion of the Circuit Court of Appeals is printed in the Record, (pp. 25-45) and is incorporated herein by reference.

Jurisdiction.

The jurisdiction of this Court is set forth in the foregoing petition.

Statement of the Case.

The case has been stated in the foregoing petition and is set forth in the opinion of the Circuit Court of Appeals, which appears in the Record and is incorporated herein by reference.

Specification of Errors.

The errors are specified in the foregoing petition and said specification is incorporated herein by reference.

Points to be Discussed.

The points to be discussed are as follows:

I: Section 15 of the Massachusetts Workmen's Compensation Act governs the common law rights of action against third parties by an employee of an employer who is insured under said Act, where the injury underlying any such cause of action occurs in Massachusetts and is controlling in the case at bar.

II: Section 18 of said Act precludes any right of common law action by such an employee as Bagnel against third parties if such third parties are sub-contractors or the employees of sub-contractors employed upon the same work and the general or superior contractor is insured under the Act and such work is "part of or process in the trade or business" of the insured.

III: Section 24 of said Act does not help the appellant to avoid the consequences of Section 18, in any attempted reservation of common law rights under the Act.

IV: The Workmen's Compensation Act of New York does not apply to the issues raised by the pleadings.

V: The general principles of Conflict of Laws and of the "Due Faith and Credit" clause of the Constitution are violated by the judgment of the Circuit Court of Appeals.

Argument.

I: Section 15 of the Act Controls Any Common Law Right of Action Against Third Parties Open to Employees of Employers Insured Under the Act.

A. *The law of the situs*

Inasmuch as the injury was received in Massachusetts and Bagnel's employer was insured under the Act, and the action is brought in the District of Massachusetts, the law of Massachusetts controls as to the existence of any cause of action based upon said injury.

Magnolia Petroleum Co. vs. Hunt, 64 U. S. S. C. Rep. 208.

Pacific Employers Ins. Co. vs. Industrial Accident Com., 306 U. S. 493, 502.
Young vs. Masci, 289 U. S. 253, 258.
Dennick vs. Central RR., 103 U. S. 11, 18.
Peterson vs. Boston & Maine RR., 310 Mass. 45, 47.
Herman vs. Sladowsky, 301 Mass. 534, 535-536.
Jackson vs. Anthony, 282 Mass. 540, 545-546.

The Circuit Court of Appeals held this proposition to be sound (Record, pp. 31-32) but failed to give it effect.

B. *The Effect of Section 15.*

Section 15 of the Act, disregarding the limitation in Section 18, provides that the employee of an insured employer, injured by the tortious conduct of a third party may (1) elect to take compensation under the Act or (2) elect to proceed at law against the tort feasor but (3) may not do both, and if he elects to take compensation under the Act, the insurer paying such compensation may sue the tort feasor at law either (a) in the name of the employee or (b) in its own name and for its own benefit.

In the case at bar, Bagnel admittedly elected to accept compensation which was actually paid by the insurer under his employer's Workmen's Compensation policy issued under the provisions of the New York Workmen's Compensation Act (Record, pp. 21, 22) and not under his employer's Massachusetts Workmen's Compensation Act. The election, however was an election to accept compensation and since his employer also carried effective Workmen's Compensation insurance under a Massachusetts policy or the insurer's Massachusetts endorsement in the New York

policy, (Record pp. 13, 21, 22) the election was likewise an election under the Massachusetts policy.

To hold that such an acceptance was effective as a waiver of common law rights under New York law only and had no effect upon Bagnel's rights in Massachusetts would be to create an absurd situation, viz: That Bagnel could not sue his employer at common law in New York but could in Massachusetts; that he could accept compensation in New York and could still sue at common law in Massachusetts for the same injury. Hence the acceptance of compensation in New York was a waiver of all common law rights wherever Bagnel might otherwise have any such rights.

The first sentence of Section 15 provides very definitely that an employee of an insured employer—as Bagnel was—cannot accept Workmen's Compensation and sue a third party tort feasor. If the employee accepts such compensation—as Bagnel did—he subrogates to the employer's insurer any right of action against such tort feasor.

Furlong vs. Cronan, 305 Mass. 464, 467.
Miller vs. Richards, 305 Mass. 424, 426.
Jordan vs. Orcutt, 279 Mass. 413, 415.
Tocci's Case, 269 Mass. 221, 224.

II: Section 18 of the Act Limits the Scope of Section 15 and Precludes Any Common Law Right of Action by the Appellee, Bagnel, Against the Appellants Under Circumstances Such as Are Herein Involved.

Section 18 of the Act, limiting very definitely the scope of Section 15, provides that if an insured person—such as Jacobson & Co., Bagnel's employer—enters into a contract with an independent contractor or a sub-contractor—such

as the appellants—to do any of the work which the insured has contracted to do, which work is "part of or process in the trade or business" carried on by the insured—as admittedly is the case at bar (Record pp. 21, 22), and if the insured would be liable to pay compensation under the Act if the injured employee was his employee, then all employees of the insured and of any independent contractor or sub-contractor, are covered by such insurance and no such employee can maintain a common law action against the insured or any such independent or sub-contractor or employee thereof.

Carlson vs. Dowgielewicz, 304 Mass. 560, 562.
Clark vs. M. W. Leahy Co. Inc., 300 Mass. 565, 568.

In the *Clark* case, *supra*, one of the leading cases upon the subject, the Supreme Judicial Court of Massachusetts, at pp. 568-569, stated the following:

> "the insurance of the general contractor or 'common employer' . . . throws its shadow over the whole work . . . Since the insurance of the 'common employer' covers and protects all employees engaged in the 'common employment' . . ., one engaged in that common employment as contractor, sub-contractor or employee cannot be a 'person other than the insured' within Section 15, and the injured employee has no option to sue him at common law. An insurer, whether of the common employer or of a sub-contractor, paying compensation to an employee, cannot recover over under Sec. 15 against a negligent contractor, subcontractor or employee engaged in the 'common employment', for the insurer succeeds only to the rights of the employee receiving compensation. . . . In the application of this rule, it is immaterial whether the subcontractors are insured or not. . . . The essential thing is the existence of a 'common employer' who is an 'insured person' under Sec. 18 . . ., and who is having work done by contract in or about premises specified in Sec. 18 . . . which work is part of or process in his trade or business."

In the *Carlson* case, *supra,* the same Court at p. 562, said:

> "This case is a case where an employee (Carlson) of the insured general contractor (the Pandolf Company) has been injured by an employee (the defendant) of an uninsured independent subcontractor (the truck owner). In such a case the insurer who has paid compensation to the injured employee cannot recover in his name or otherwise against the defendant."

The purpose of the Act and Section 18 thereof is set forth in the case of *Bindbeutel vs. L. D. Wilcutt & Sons Co.*, 244 Mass. 195, at pp. 198-199 as follows:

> "It was the purpose of the . . . act to give all the workmen in a common job the benefit of the statute. It was not the purpose of the act to place a greater burden upon the general contractor than upon the subcontractors *where all were insured* . . . with this end in view (Sect. 18) was enacted, making the general contractor liable under the act to the employees of the sub-contractor in case the latter did not insure his employees as provided by the Statute . . . It was the purpose . . . to give all the employees the benefit of the act, and to induce all employees on the job to carry insurance . . ."

To the same effect, see

Cozzo vs. Atlantic Refining Co., 299 Mass. 260, 267.

Dresser vs. N. H. Structural Steel Co., 296 Mass. 97, 100-101.

Section 18 provides for and operates upon three contingencies:

1. Where the employee gives his employer written waiver of his common law rights against his employer within thirty days of notice of his employer insuring under the Act;

2. Where the employee for thirty days after such notice fails to give his employer any written reservation of common law rights.

   Clark vs. *M. W. Leahy Co. Inc.*, 300 Mass. 565, 568.

3. Where the employee within thirty days of such notice claims or accepts compensation for an injury received within such thirty days.

In all of these cases, Section 18 precludes a common law action against a tort feasor included within the category set up in said section.

The Circuit Court of Appeals erroneously held that the case at bar falls within the second category, *supra*, and that the facts did not support the findings and rulings of the District Court (Record, pp. 20-21) to the effect that Section 18 of the Act precluded the maintenance of Bagnel's law actions, whereas, in fact and in law, the case at bar falls within the third category.

Under the decision in the *Carlson* case, *supra*, Bagnel is clearly barred from maintaining his common law actions.

Bagnel admittedly accepted compensation provided by Workmen's Compensation insurance covering this Springfield job upon which he was injured (Record, pp. 21, 22). There he most effectively waived any common law rights which might otherwise arise out of his injury. His employer's insurer—the same in Massachusetts as in New York (Record, pp. 21, 22)—was bound to pay Bagnel such compensation. The situation is squarely within the provisions of Section 18 of the Act and the decision in the *Carlson* case, *supra*.

In the case at bar, also, the appellants, Springfield Sand and Tile Company and Construction Service Corporation admittedly were independent contractors or sub-contractors of Jacobson & Co., engaged upon work which was part of and process in the trade or business of Jacobson & Co. (Record, pp. 21, 22).

Under Section 18, therefore, the employee of the insured, in this case Bagnel, the employee of the insured Jacobson & Company, cannot maintain any common law action against any sub-contractor of the insured—such as Springfield Sand and Gravel Company or Construction Service Corporation.

III: Section 24 of the Act Does Not Help the Appellee, Bagnel, to Avoid the Consequences of Section 18 of the Act.

The Circuit Court of Appeals held, in substance, that under the provisions of Section 24 of the Act it was incumbent upon the appellants to show the following:

A. That Jacobson & Company were insured under the Act when Bagnel entered its employ in 1937; or

B. That Jacobson & Company so insured after Bagnel entered its employ in 1937;

C. That, in the latter event

1. Jacobson & Company gave notice of so insuring under the Act;

2. Thirty days expired from the date of such notice without Bagnel having given "written notice that he claimed" or reserved his "right of action at common law" under which conditions he would be "held to have waived" such right.

D. That the appellants had failed in this respect and therefore failed to establish their special defense and the basis for their petitions for declaratory judgments (Record, pp. 44-5).

Section 24 refers exclusively and entirely to common law actions by an employee against his insured employer where there has been no previous waiver of common law rights. It does not apply in any respect to a common law action brought by an employee of an insured general contractor against a sub-contractor where there has been a definite acceptance of compensation and waiver of common law rights prior to the institution of such action, as is the situation in the case at bar. The Circuit Court of Appeals, therefore, erred prejudicially in applying the provisions of Section 24 to the case at bar and in ruling substantially that, in the absence of proof of the non-applicability of Section 24 or of compliance with its provisions the Workmen's Compensation Act of New York applied and that Bagnel might maintain a common law action there under even in the District of Massachusetts (Record, pp. 20-21).

The only provisions of the Act applicable to the case at bar are those found in Sections 15 and 18 which have been heretofore argued.

IV: The Circuit Court of Appeals Violated the General Principles of Conflict of Laws and Article IV, Section 1, of the Constitution of the United States by its Judgment.

The District Court found the facts as agreed upon that Bagnel's injury arose out of his work upon the Springfield job; that his employer, Jacobson & Sons Co., the general contractor, was insured under the Act, that Springfield Sand and Tile Company and the Construction Service Corporation were sub-contractors of Jacobson & Sons Co., and ruled that Jacobson & Sons Co.'s Massachusetts policy covered Bagnel's employment and that under the Act

Bagnel had no common law action for negligence against the appellants. This is in accord with the principles of Conflict of Laws under the decisions of the Court of Massachusetts.

Peterson vs. B. & M. RR., 310 Mass. 45, 47.
Herman vs. Sladowsky, 301 Mass. 534, 535-536.
Jackson vs. Anthony, 282 Mass. 540, 545-546.

and also in accord with such decisions under section 18 of the Act.

Carlson vs. Dowgielswicz, 304 Mass. 560, 562.
Clark vs. M. W. Leahy & Co. Inc., 300 Mass. 565, 568.

In vacating the judgments and decrees of the District Court, the Circuit Court of Appeals did violence to these principles of Conflict of Laws, as adjudicated in other cases by this Court and to Article IV, Section 1, of the Constitution of the United States.

Magnolia Petroleum Co. vs. Hunt, 64 U. S. S. C. Rep. 208.
Pacific Employers Ins. Co. vs. Industrial Accident Commission, 306 U. S. 493, 502.

V: Conclusion.

Wherefore your petitioners respectfully submit that the petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit should be issued.

Respectfully submitted,

Thomas H. Mahony,
Attorney for Petitioners.

Of Counsel:
John I. Robinson,
Joseph J. Leonard.

APPENDIX.

General Laws of Massachusetts, Chapter 152—Workmen's Compensation Act, Sects. 1, 15, 18, 21, 22, 24, 26, 46.

"Section 1. The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

* * *

"(4) 'Employee', every person in the service of another under any contract of hire, expressed or implied, oral or written . . .

"(6) 'Insured' or 'insured person' an employer who has provided by insurance for the payment to his employees by an insurer of the compensation provided for by this chapter.

"(7) 'Insurer' any insurance company authorized so to do which has contracted with an employer to pay the compensation provided for by this chapter.

* * *

"Section 15. Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but, except as hereinafter provided, not against both. If compensation be paid under this chapter, the insurer may enforce, in the name of the employee or in its own name and for its own benefit, the liability of such other person, and if, in any case where the employee has claimed or received compensation within six months of the injury, the insurer does not proceed to enforce such liability within a period of nine months after said injury, the employee may so proceed. In either event the sum recovered shall be for the benefit of the insurer unless such sum is greater than that paid by it to the employee, in which case four fifths of the excess shall be paid to or retained by the employee. (As amended by Mass. L. (1939) c. 401) . . .

"Section 18. If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons. The insurer, however, shall be entitled to recover indemnity from any other person who would have been liable to such employees independently of this section; and if the insurer has paid compensation under this section; it may enforce, in the name of the employee or in its own name and for its benefit, the liability of such other person. The insurer shall also be entitled to recover from the uninsured independent contractor or the uninsured sub-contractor, all compensation benefits and expenses, medical, hospital or otherwise, that it has paid or may become obligated to pay on account of any injury to the employee or employees of any such uninsured independent contractor or uninsured sub-contractor: provided, that this provision shall not authorize the insurer to recover from such a contractor or sub-contractor an amount which, together with any sum recovered under this chapter from any other person on account of the payment of compensation to such employee or employees, will exceed in the aggregate the amount of such compensation benefits and expenses. This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured, nor to any case where the injury occurred elsewhere than on, in or about the premises on which the contractor has undertaken to execute the work for the insured or which are under the control or management of the insured. The word 'premises', as used in this section, shall include the public highways if the contract requires or necessitates the use of the public highways."

"Section 21. Every insured person shall, as soon as he secures a policy, give written or printed notice to all persons under contract of hire with him that he has provided for payment to injured employees by the insurer.

"Section 22. Every insured person shall give written or printed notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the insurer. An employer ceasing to be insured shall, on or before the day on which his policy expires, give written or printed notice thereof to all persons under contract with him. In case of the renewal of the policy no notice shall be required. He shall file a copy of said notice with the department. The notices required by this and the preceding section may be given in the manner therein provided or in such other manner as may be approved by the department.

* * *

"Section 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. An employee who has given notice to his employer that he claimed his right of action as aforesaid may waive such claim by a written notice, which shall take effect five days after it is delivered to the employer or his agent. The notices required by this section shall be given in such manner as the department may approve."

"Section 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business af-

fairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury; provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it. For the purposes of this section, any person while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's general authorization or approval, in the performance of work in connection with the business affairs or undertakings of his employer, and whether within or without the commonwealth, and any person who, while engaged in the usual course of his trade, business, profession or occupation, is ordered by an insured person, or by a person exercising superintendence on behalf of such insured person, to perform work which is not in the usual course of such trade, business, profession or occupation, and, while so performing such work, receives a personal injury, shall be conclusively presumed to be an employee.

"Section 46. No agreement by any employee to waive his rights to compensation shall be valid, but an employee who is for any reason peculiarly susceptible to injury or who is peculiarly likely to become permanently or totally incapacitated by an injury may, at the discretion of the department and with its written approval within three months after the beginning of his employment, waive his rights to compensation under sections thirty-four, thirty-five and thirty-six, or any of them. (1919, 751, II, Sec. 20; 1927, 309, Sec. 9; 1941, 378, appvd. June 13, 1941.)

Consolidated Laws of New York, chap. 167, sec. 29:

"Remedies of employees, subrogation. 1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to

take compensation under this chapter or to pursue his remedy against such other but may take such compensation and at any time either party thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the provisions of this section. If such injured employee, or in case of death, his dependents, take or intend to take compensation under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation, or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the commissioner, the employer and the insurance carrier upon a form prescribed by the commissioner.

"2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settle-

ment or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents . . .."

United States Constitution, Art. IV, Sec. 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

FILED
SEP 11 1944
CHARLES ELMORE CROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1944.

No. 349.

SPRINGFIELD SAND & TILE COMPANY ET AL.,
Petitioner,

v.

JAMES BAGNEL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

ROSCOE WALSWORTH,
Attorney for Respondent.

Of Counsel:
RALPH H. WILLARD,
ANDREW B. GOODSPEED.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
Statement of matter involved	1
Questions presented	2
Argument	2
I. Did Bagnel elect to be bound by the Massachusetts Workmen's Compensation Act?	2
II. Was Bagnel barred from bringing actions against the petitioners at common law, based upon their negligence, either by the New York Compensation Law or by the Massachusetts Workmen's Compensation Act?	5
A. Under the New York Compensation Law	5
B. Under the Massachusetts Workmen's Compensation Act	8
Conclusion	11

Table of Authorities Cited.

CASES.

Alaska Packers Assn. v. Indus. Acc. Com., 294 U.S. 532	10
Bauer's Case, 314 Mass. 4, 49 N.E. (2d) 118	9
Bradford Elec. Light Co. v. Clapper, Admx., 286 U.S. 145	10
Carlson v. Dowgielewicz, 304 Mass. 560, 24 N.E. (2d) 538	10
Clark v. M. W. Leahy Co., Inc., 300 Mass. 565, 16 N.E. (2d) 57	7, 10
Gilbert v. Wire Goods Co., 233 Mass. 570 (1919), 124 N.E. 479	4
Gould's Case, 215 Mass. 480, 102 N.E. 693	8
Magnolia Petroleum Co. v. Hunt, 320 U.S. 430	5
McLaughlin's Case, 274 Mass. 217, 174 N.E. 338	9
Migues's Case, 281 Mass. 373, 183 N.E. 847	9

Page

Opinion of the Justices, 209 Mass. 607, 96 N.E. 308 2
Pacific Employers Ins. Co. v. Indus. Acc. Comm., 306 U.S. 493 10
Pederzoli's Case, 269 Mass. 550, 169 N.E. 427 8, 9
Post v. Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351 8
Quong Ham Wah Co. v. Indus. Acc. Com. of Cal., 184 Cal. 26 9
Smith v. Aerovane Utilities Corp., 259 N.Y. 126, 181 N.E. 72 7, 9
Wright's Case, 291 Mass. 334, 197 N.E. 5 9
Young v. Duncan, 218 Mass. 346, 106 N.E. 1 3, 4

STATUTES.

Mass. Acts of 1927, c. 309, secs. 3, 5 8, 9
Mass. Acts of 1943, c. 529, sec. 6 4
Mass. Workmen's Compensation Act, G.L. (Ter. Ed.) c. 152 2, 3, 4, 5, 6, 7, 8, 10, 11
New York Compensation Law, Consol. Laws, c. 167 2, 5, 6, 7, 9

U.S. Supreme Court Rules, Rule 38, par. 5 11

TEXTBOOKS.

Sutherland, Statutory Construction (3d ed., 1943), sec. 1930 4

Supreme Court of the United States.

October Term, 1944.

No. 349.

SPRINGFIELD SAND & TILE COMPANY ET AL.,
Petitioner,
v.
JAMES BAGNEL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of Matter Involved.

James Bagnel was injured on January 18, 1941. Some four years prior thereto he was hired in New York by Jacobson & Co., Inc., and had worked there. He was a resident of New York during his employment.

Jacobson & Co., Inc., was the general contractor in the manufacture of artificial stone actually being done by the petitioners as sub-contractors. Because of dissatisfaction with the character and progress of the work Jacobson & Co., Inc., on or about January 6, 1941, sent Bagnel to Massachusetts to temporarily participate in the job for his employer. He was injured while on the job in Massachusetts.

At the time of Bagnel's accident Jacobson & Co., Inc., was insured under the New York Workmen's Compensation Law, which was compulsory in respect to Bagnel's employment. By endorsement to its insurance policy coverage was also provided under the Massachusetts Workmen's Compensation Act, which was elective alike to employer and employee. Following his injury Bagnel accepted the benefits of the New York Act and thereafter brought actions against the petitioners alleging that their negligence caused his injuries.

Questions Presented.

I. Did Bagnel elect to be bound by the Massachusetts Workmen's Compensation Act?

II. Was Bagnel barred from bringing actions against the petitioners at common law, based upon their negligence, either by the New York Compensation Law or by the Massachusetts Workmen's Compensation Act?

Argument.

I. Did Bagnel elect to be bound by the Massachusetts Workmen's Compensation Act?

The Massachusetts Act, at the time of this accident, was elective with respect to both employers and employees. *Opinion of the Justices*, 209 Mass. 607, 96 N.E. 308. The employer was free to provide or to ignore workmen's compensation. The only way in which the employee's freedom to elect was preserved was by section 24 of the Act, General Laws (Ter. Ed.) chapter 152, as follows:

> "Notice by employee to retain rights at common law. An employee of an insured person shall be held

> to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein incurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. . . ."

Even were it assumed that Jacobson & Co., Inc., had already provided workmen's compensation under the Massachusetts Act, when Bagnel was hired in New York by a New York concern to work in New York there would have then been no occasion for him to make an election. However, this is not to be assumed by any fact in the record. Bagnel's election must be found within the terms of the second provision of section 24.

The employee is held to have elected under the second provision to come within the Massachusetts Act when he has failed to reserve his common-law rights "*within thirty days of notice of such insurance.*" The record fails to show that such notice was given.

In *Young* v. *Duncan*, 218 Mass. 346, 106 N.E. 1 (1914), the court distinguishes between an election by the employee under the first provision of section 24 and an election under its second provision. Knowledge or notice that the employer is insured is not essential to an election by the employee under the first provision. The court said (pp. 349-350):

> "This absolute and unequivocal provision is not made dependent upon any other condition or circumstance. It is not made to rest upon knowledge or

notice to him of the fact that the employer is a subscriber. That it was not intended to be dependent upon such knowledge or notice is plain from the concluding clause which, in the event of the employer becoming a subscriber after the employment, makes such waiver dependent upon notice. The expression of this condition in the one class of cases impliedly would exclude it from the other, even if the language used were less plain."

The decision in *Young* v. *Duncan* was reaffirmed in *Gilbert* v. *Wire Goods Co.*, 233 Mass. 570 (1919), 124 N.E. 479, arising under the second provision of section 24. It is to be observed that the notice required of the employer had been given in the latter decision. Bagnel was not required to make an election by giving notice of his reservation of common-law rights unless and until his employer had first given the notice required of an employer. It follows that he had not elected to be bound by the whole or any part of the Massachusetts Compensation Act.

By virtue of Massachusetts Acts and Resolves of 1943, chapter 529, section 6, the provisions of section 24 as effective upon Bagnel's rights have ceased to be of future significance. The fact of the subsequent amendment, which no longer requires notice by the employer, implies a change in the earlier law and knowledge of its judicial construction. Sutherland, Statutory Construction (3d ed., 1943), section 1930.

Because of the foregoing authorities the decision of the Circuit Court of Appeals may be upheld upon the ground that the petitioners failed to sustain the burden of proving their defense. This may be done by reference solely to the Massachusetts Act and the Massachusetts decisions interpreting the Act.

II. Was Bagnel barred from bringing actions against the petitioners at common law, based upon their negligence, either by the New York Compensation Law or by the Massachusetts Workmen's Compensation Act?

A. Under the New York Compensation Law.

Bagnel, in these actions, is neither seeking compensation provided *by his employer* under the Massachusetts Workmen's Compensation Act, nor is he suing *his own employer* in tort under the common law. It does not even appear from the record that he received an award under the New York Compensation Law. The Transcript of Record, at page 21, the last clause in the paragraph numbered 7, states no more than that "Bagnel accepted the benefits of the Workmen's Compensation Law of the State of New York." The decision of *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430 (1943), stressed in the petitioners' brief, is not in point, being distinguishable by the foregoing.

The New York Workmen's Compensation Law is compulsory as to employer and employee alike when they are engaged in certain specified "hazardous employments." That Bagnel was engaged in such an employment is shown by Consolidated Laws of New York, chapter 167, section 3, "Application," as follows:

> "1. Hazardous Employments. Compensation shall be payable for injuries or death incurred by employees in the following employments: . . . Group 6. Manufacture of: Stone, artificial."

The employer is required to provide compensation.

> "*Section 10.* Liability for compensation. Every employer subject to this chapter shall in accordance

with this chapter . . . , secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of or in the course of the employment without regard to fault as a cause of the injury . . ."

The liability of the employer, when compensation is provided, is exclusively under the Compensation Law. The employee has no election whether to come under the Law or to pursue common-law rights against his employer, the election permitted by the Massachusetts Act.

> "*Section 11.* Alternative Remedy. The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee . . .
>
> "*Section 32.* Waiver agreements void. No agreement by an employee to waive his right to compensation under this chapter shall be valid."

Also, unlike section 15 of the Massachusetts Act, which provides:

> "Where the injury *for which compensation is payable* was caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but, except as hereinafter provided, not against both. . . ."—

the New York Law, in section 29, provides:

> "Remedies of employees, subrogation 1. If an employee entitled to compensation under this chapter be

injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation under this chapter or to pursue his remedy against such other but may take such compensation and at anytime either prior thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the provisions of this section. If such injured employee, . . . , take or intend to take compensation under the chapter and desire to bring action against such other, such action must be commenced not later than six months after awarding of compensation and in any event before the expiration of one year from the date such action accrues." (Added by laws of 1937, chapter 684.)

Comparison of the two sections shows the New York Law expressly provides the employee shall not be barred from pursuing third-party rights, or held to have made an election, by accepting compensation. The Massachusetts Act limits the effect of section 15 to injuries "for which compensation is payable," meaning compensation under the Massachusetts Act. See *Clark* v. *M. W. Leahy Co., Inc.*, 300 Mass. 565, at pages 569 and 570, 16 N.E. (2d) 57 (1938).

The New York Law gives extraterritorial effect to its provisions when the work done outside the state was transitory and incidental to a New York employment. *Smith* v. *Aerovane Utilities Corp.*, 259 N.Y. 126, 181 N.E. 72 (1932). See also section 13 (*b*).

B. Under the Massachusetts Workmen's Compensation Act.

Early in the history of workmen's compensation legislation it was settled by the decision in *Gould's Case*, 215 Mass. 480, 102 N.E. 693 (1915), that the Massachusetts Act had no extraterritorial effect. One objection raised at page 485 was that "If our act is to be interpreted as having extraterritorial force, similar effect must be accorded to like laws of other States." This localized view continued until section 26 of the Act was amended by Acts of 1927, chapter 309, section 3, to read as follows:

> "SECTION 26. Payments. Presumption of employment. Extraterritoriality. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, . . . *and whether within or without the commonwealth, he shall be paid compensation by the insurer,* as hereinafter provided, if his employer is an insured person at the time of the injury; *provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it . . .*" (The italicized words were added by Acts of 1927, chapter 309, section 5.)

Following the 1927 amendment to section 26 of the Act it was held that injuries received by an employee when outside the state "arising out of and in the course of his employment" in Massachusetts should be compensated. *Pederzoli's Case*, 269 Mass. 550, 169 N.E. 427 (1930). The opinion, on page 553, cites the New York decision of *Post*

v. *Burger & Gohlke,* 216 N.Y. 544, 111 N.E. 351 (1916), which is relied upon in the more recent decision of *Smith* v. *Aerovane Utilities Corp.,* 259 N.Y. 126, 181 N.E. 72 (1932), interpreting the extraterritorial provisions of the New York Compensation Law.

The Pederzoli decision was followed by *McLaughlin's Case,* 274 Mass. 217, 174 N.E. 338 (1931). On page 219 the court stated as follows:

> "It is settled law that an employee who makes a contract of employment in this State with a Massachusetts employer to do work outside the Commonwealth, and while so occupied is injured, can recover under the workmen's compensation act."

On page 221 the court added:

> "The compensation act of the place of hiring, therefore, is applicable. This construction of the statute does not render it in conflict with the full faith and credit clause of the Federal Constitution" (citing *Quong Ham Wah Co.* v. *Industrial Acc. Com. of California,* 184 Cal. 26, 36).

This interpretation of the 1927 amendment, that the place of hiring governs which of two or more compensation acts is applicable, has been consistently followed in Massachusetts and may be considered its declaration of public policy in point. Thus its public policy is in harmony with the New York law. *Migues's Case,* 281 Mass. 373, 183 N.E. 847 (1933). *Wright's Case,* 291 Mass. 334, 197 N.E. 5 (1935). *Bauer's Case,* 314 Mass. 4, 49 N.E. (2d) 118 (1943).

No Massachusetts decision has ever refused to recognize the extraterritorial effect of the law of the state where the contract of employment was made. The decisions of

Pacific Employers Insurance Co. v. *Industrial Accident Commission*, 306 U.S. 493 (1939), and *Alaska Packers Assn.* v. *Industrial Accident Commission*, 294 U.S. 532 (1935), have decided that "Due Faith and Credit" do not require one state to give way to the compensation act of another state in violation of its own established public policy or interests. However, when no violation of this character is demonstrated the forum state will give "Due Faith and Credit" to the foreign law. *Bradford Electric Light Co.* v. *Clapper, Admx.*, 286 U.S. 145 (1932).

The common-employment theory, urged as a defense by the petitioners, is summarized in the case of *Clark* v. *M. W. Leahy Co., Inc.*, 300 Mass. 565, 16 N.E. (2d) 57 (1938), which the decision in *Carlson* v. *Dowgielewicz*, 304 Mass. 560, 24 N.E. (2d) 538 (1939), quotes and follows. However, this theory does not apply when the injured employee has no right to compensation under the Massachusetts Act. The limitation is clearly stated on pages 569 and 570 of the decision:

> "The waiver of rights of action at common law under G. L. (Ter. Ed.) c. 152, § 24, assumes an injury which is compensable under the workmen's compensation act. The Legislature intended indeed to make it difficult for either employer or employee to escape from the system of personal injury insurance provided by the act. *Young* v. *Duncan*, 218 Mass. 346, 349. *McDonnell* v. *Berkshire Street Railway*, 243 Mass. 94. But the Legislature did not intend to deprive an employee of a right of action at common law without giving him a right to compensation under the act. In *Zygmuntowicz* v. *American Steel & Wire Co. of New Jersey*, 240 Mass. 421, 424, the immunity of an insured employer to an action by one employee for an assault by another, was put on the ground that the

resulting injury was compensable. See also *White* v. *E. T. Slattery Co.* 236 Mass. 28, 31; *Cameron* v. *State Theatre Co.* 256 Mass. 466; *Caira* v. *Caira*, 296 Mass. 448. On the other hand, where a personal injury to an employee who has reserved no common law rights is not of a compensable class, he may recover at common law from his employer provided he can show a breach of duty. *Ross* v. *John Hancock Mutual Life Ins. Co.* 222 Mass. 560. *White* v. *Checker Taxi Co.* 284 Mass. 73, 75. When the immunity from common law action for personal injury becomes extended to those who are working in various capacities under a 'common employer' who is 'an insured person,' that immunity is granted, as in the simple case of a single employer and his employee, only where the personal injury is a compensable one. *Cozzo* v. *Atlantic Refining Co.* 299 Mass. 260, 262-263. In the present case the facts found show that the plaintiff's injury was compensable. Indeed, compensation was actually paid for it."

Since Bagnel has no right to compensation under the Massachusetts Act, the common-employment theory is not a bar to his third-party rights.

Conclusion.

None of the reasons ordinarily deemed sufficient to move this court to grant certiorari is presented in this case. Supreme Court Rules, Rule 38, paragraph 5. The decision of the Circuit Court of Appeals was clearly right. We urge that the petition be denied.

Respectfully submitted,

ROSCOE WALSWORTH.